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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 12 2006

WAC 05 109 54704

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability. The petitioner seeks to employ the beneficiary as an animator/graphic designer. The petitioner asserts that the beneficiary qualifies for Schedule A, Group II designation. The director found that the beneficiary was not an alien of exceptional ability pursuant to the regulations at 8 C.F.R. § 204.5(k)(3)(ii). Thus, the director did not reach whether the beneficiary qualified for Schedule A, Group II designation.

On appeal, counsel asserts that the Interoffice Memorandum from Associate Director for Operations, Citizenship and Immigration Services (CIS) HQPRD70/8.5, "Revisions to *Adjudicator's Field Manual (AFM)* Chapters 22.2(b)(3)(C) and 22.2(b)(7) (AFM Update AD 05-08)," September 23, 2005, provides that an alien must first meet Schedule A, Group II designation and then meet the criteria for the underlying visa category. Thus, counsel presumes that the director, by not addressing the Schedule A, Group II criteria, found that the petitioner met those criteria.

Counsel is not persuasive. First, counsel never discussed how the beneficiary qualifies as an alien of exceptional ability as defined by CIS regulations in his initial cover letter. As such, the director's inquiry into that issue alone in the request for additional evidence in no way implies a finding regarding Schedule A, Group II designation. Second, page 7 of the memorandum merely states that Schedule A, Group II designation and visa eligibility are "separate" determinations. The memorandum does not require that one or the other determination be made first. Regardless of the order of evaluation, it remains that an alien must meet the criteria for the visa classification and Schedule A, Group II designation. The criteria for Schedule A, Group II are far more exclusive, requiring international recognition as opposed to the degree of expertise significantly above that ordinarily encountered in the field required for the visa classification. As an alien must meet both sets of criteria, whether the alien meets the criteria for Schedule A, Group II designation becomes moot if she does not meet the criteria for the visa classification. Thus, we will not presume that the director found that the petitioner meets the requisite criteria for Schedule A, Group II. For the reasons discussed below, we find that she does not.

In general, counsel and many of the reference letters assert that the beneficiary's exceptional ability should be presumed from the shows on which she works, as award-winning shows would only hire the best of the best. We do not presume eligibility as an alien of exceptional ability and especially not the widespread acclaim and international recognition required for Schedule A, Group II designation from association. The petitioner must demonstrate the beneficiary's abilities and recognition individually.

For the reasons discussed below, while we find the beneficiary's remuneration significant, the remaining evidence cannot serve to meet any of the other regulatory criteria for the visa classification and none of the criteria for Schedule A, Group II designation.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following information regarding labor certification and Schedule A designation:

> **(i) General.** Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

Visa Classification Eligibility

The petitioner seeks classification as an alien of exceptional ability. The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. These criteria follow below.

The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." The petitioner claims to meet the following criteria.

> *An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability*

The beneficiary has a baccalaureate degree in Film/Character Animation from the California Institute of Arts. The director concluded that the petitioner has not established that "each and every student attending [the California Institute of the Arts] will, after completing and receiving a degree, is now [sic] in possession of exceptional ability." On appeal, counsel asserts that the evidence submitted to meet a single criterion need not, by itself, establish exceptional ability. Counsel cites two Federal district court decisions, only one of which is published, in support of this proposition.

In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. In addition, as the published decisions of the district courts are not binding on the AAO outside of that particular proceeding, the unpublished decision of a district court would necessarily have even less persuasive value.

Moreover, the district court decisions cited relate to the regulations pertinent to aliens of extraordinary ability pursuant to section 203(b)(1)(A) of the Act. In this matter, section 203(b)(2)(C) of the Act provides that the possession of a degree, diploma, certificate or similar award from a college, university school or other institution of learning shall not by itself be considered sufficient evidence of exceptional ability. Thus, we must determine whether the beneficiary's degree is indicative of or consistent with a degree of expertise significantly above that ordinarily encountered.

The U.S. Department of Labor's Occupational Outlook Handbook 236 (February 2006) provides:

> Postsecondary training is recommended for all artist specialties. Although formal training is not strictly required, it is very difficult to become skilled enough to make a living without some training. Many colleges and universities offer programs leading to the bachelor's or master's degree in fine arts. . . .
>
> Independent schools of art and design also offer postsecondary studio training in the craft, fine, and multi-media arts leading to a certificate in the specialty or to an associate's or bachelor's degree in fine arts.

In order to meet this criterion, the petitioner must demonstrate that the beneficiary's level of education is above that ordinarily encountered in the field. The petitioner has provided no evidence that, ordinarily, animators do not have at least a bachelor's degree in the field. Thus, the petitioner has not established that the beneficiary meets this criterion.

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought

The petitioner does not claim that the beneficiary meets this criterion and the employment letters do not establish at least ten years of full-time experience in the occupation.

A license to practice the profession or certification for a particular profession or occupation

The petitioner does not claim that the beneficiary meets this criterion and the record contains no evidence relating to it.

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability

Initially, the petitioner submitted evidence that it paid the beneficiary $1,442 per week from December 1, 2004 through March 3, 2005 with one week's wages totaling $2,090.90 during that period. In response to the director's notice of intent to deny, counsel asserted that statistics from the Department of Labor's Bureau of Labor Statistics (BLS) indicate that the beneficiary's wages were above those ordinarily encountered in the field. The petitioner submitted evidence that the beneficiary earned $21,736.36 in the first quarter of 2005, earning $1,442 most weeks. The BLS statistics for 2004 reflect that the 75 percentile wages for animators is $70,730 annually or $34.01 per week.

The director concluded that a comparison of wages was not possible since animators may not work a full twelve months. On appeal, counsel asserts that the remuneration, not the number of hours worked, is relevant. Counsel asserts that for 11 months of employment, the beneficiary received $75,744.13, however, the record lacks evidence of this compensation, such as quarterly reports, pay stubs or a Form W-2.

As stated above, the 75th percentile hourly wage in 2004 was $34.01. The beneficiary's weekly wages of $1,442 amount to $36.05 per hour, assuming a 40-hour week as indicated on the uncertified Form ETA-750A. As $36.05 per hour is above the 75th percentile, we are satisfied that the beneficiary's wages were significantly above those ordinarily encountered in the field. Thus, we are persuaded that the beneficiary meets this criterion.

Evidence of membership in professional associations

The petitioner does not assert that the beneficiary meets this criterion and the record contains no evidence relating to it.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

The initial cover letter did not address the regulatory criteria for the visa classification. In response to the director's notice of intent to deny, counsel relied on reference letters and awards won by shows on which the petitioner worked as a character layout artist. Counsel referenced non-precedent decisions by this office for the propositions that the significance of an award is not diminished because a team won it

and that the award need not be issued to the individual alien. The director concluded that there were large gaps between episodes on which the beneficiary worked and that the record lacked evidence to support the reference letters. On appeal, counsel reiterates his previous assertions and explains how the director erred in concluding that there were gaps between episodes.

We find that this criterion requires evidence of formal recognition outside of the preparation of the petition. Reference letters prepared for the petition, while not without weight, cannot serve as the sole basis of eligibility under this criterion. While we agree with counsel regarding the significance of team awards, we are not persuaded that any award received by a project on which the beneficiary worked is evidence of the beneficiary's personal recognition.

The record contains evidence that the beneficiary worked as one of several character layout artists for "The Simpsons" and "Futurama," both of which have won awards for music, sound editing and in general categories. Voice actors and members of the crew other than the beneficiary have also won individual awards for their work on these shows. The beneficiary cannot be credited with the ASCAP Film and Television Awards, the BMI Film & TV Awards for Music, Writers Guild of America Awards and Emmy Awards in music, sound editing or voice-over categories as the petitioner was not involved in these aspects of the show. Similarly, the petitioner cannot be credited with the Annie Awards for Outstanding Directing, Music, Writing, or even for Best Individual Achievements awarded specifically to voice-over actors or other members of the crew.

Both "The Simpsons" and "Futurama" won more general awards, such as the Saturn Award for Best Genre Network TV Series; the E Pluribus Unum Award for Television Series – Comedy; the American Comedy Award for Funniest Television Series; the Annie Awards for Outstanding Achievement in an Animated Television Production and Best Animated TV Program; British Comedy Awards for Best International Comedy Show; and Emmy Awards for Outstanding Animated Program. These general awards, however, were not awarded in recognition of the character layouts or even the animation in particular, as opposed to recognizing the show in general. Significantly, the actual recipients of the Emmy Awards for Outstanding Animated Program were listed and the list does not include the beneficiary. The record contains evidence that "The Simpsons" won three specific animation awards, a 2000 CINE Golden Eagle for Animation and 1997 and 1998 World Animation Celebration (WAC) Awards. All of these awards were issued prior to the beneficiary's association with the show and, thus, are not indicative of her personal recognition.

In response to the director's notice of intent to deny, the petitioner submitted a letter from Bob Anderson, one of the petitioner's directors, who asserts that an episode of "The Simpsons" on which the beneficiary worked has been nominated for an Emmy and, if awarded, will include the beneficiary as a recipient. A petitioner must establish the beneficiary's eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Thus, any recognition awarded after the date of filing cannot be considered evidence of eligibility as of that date.

In light of the above, the petitioner has not established that the beneficiary meets this criterion, as the evidence submitted is not indicative of her personal recognition.

Comparable evidence pursuant to 8 C.F.R. § 204.5(k)(3)(iii)

In response to the director's notice of intent to deny and on appeal, counsel asserts that the petitioner has submitted comparable evidence to establish the beneficiary's eligibility, including evidence that she plays a leading or critical role for distinguished organizations and published materials featuring the beneficiary.

The regulation at 8 C.F.R. § 204.5(k)(3)(iii) provides:

> If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility.

The petitioner has not established that the above standards are not readily applicable to the occupation of animator. While a baccalaureate degree may not be above that ordinarily encountered in the field, a higher degree might be. Certainly an animator may be able to demonstrate 10 years of full-time experience. As discussed above, the petitioner has demonstrated that the beneficiary earns a remuneration above that ordinarily encountered in the field. The petitioner has not demonstrated that there are no professional animator associations that might be indicative of a degree of expertise significantly above that ordinarily encountered in the field. Finally, the record contains evidence of several individual achievement awards in the field of animation. While the beneficiary worked on shows with animators who won such awards, she did not personally receive such an award. Nevertheless, it is clear that the criterion is applicable. Thus, while expert animators may not obtain licenses in the field, it would appear that the remaining criteria are applicable to the beneficiary's occupation. Thus, the petitioner has not demonstrated that we need consider any claims of comparable evidence.

Regardless, while we do not doubt that "The Simpsons" and "Futurama" enjoy a distinguished reputation as is clear from the list of numerous awards, the petitioner has not established the beneficiary's leading or critical role for either production. We acknowledge the numerous letters attesting, in general terms, to the importance of the beneficiary's role for both shows. Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

As stated above, the beneficiary is one of several character layout artists credited. We note that the Emmy Awards list several animation producers and executive animation producers. Without an organizational chart demonstrating the number of character layout artists employed by the petitioner and the hierarchy above them in the animation department, we cannot determine the significance of the beneficiary's role beyond the obvious need for the petitioner to employ competent and creative character layout artists.

The petitioner also submitted four brief German articles. Counsel characterizes these articles as "multiple press clippings from international media sources." The four articles, as will be discussed below in more detail, all appear to come from local German newspapers from the beneficiary's hometown. The record simply lacks evidence of the significance of these materials.

In light of the above, the petitioner has not established the beneficiary's eligibility for the visa classification requested. We acknowledge that in response to the director's notice of intent to deny, counsel requested that, in the alternative, the beneficiary be considered under a lesser classification, skilled workers, pursuant to section 203(b)(3) of the Act. The director concluded that this classification did not permit Schedule A, Group II designation in place of a labor certification approved by the Department of Labor. On appeal, counsel correctly notes that the regulation at 8 C.F.R. § 204.5(l)(3)(i) permits the submission of an application for Schedule A designation.

Counsel provides no legal authority, and we know of none, that permits CIS to consider more than one classification while adjudicating a single petition. Regardless, even if we were to consider the beneficiary eligible as a skilled worker, the petitioner has not established that the beneficiary qualifies for Schedule A, Group II designation for the reasons discussed below.

Schedule A, Group II

Beyond the decision of the director, the beneficiary does not qualify for Schedule A, Group II designation. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

In order to establish eligibility for Schedule A, Group II designation, the petitioner must establish that the beneficiary qualifies as an alien with exceptional ability as defined by the Department of Labor. This petition seeks to classify the beneficiary as an alien with exceptional ability in the arts. 20 C.F.R. § 656.22(d), as in effect when the petition was filed, provides:

> An employer seeking labor certification on behalf of an alien under Group II of Schedule A shall file, as part of its labor certification application, documentary evidence testifying to the *widespread acclaim and international recognition* accorded the alien by recognized experts in their field; and documentation showing that the

> alien's work in that field during the past year did, and the alien's intended work in the United States will, require exceptional ability.

(Emphasis added.) In addition, the same provision outlines ten criteria, at least two of which must be satisfied for an alien to establish the widespread acclaim and international recognition necessary to qualify as an alien of exceptional ability. While counsel asserts that the petitioner has submitted comparable evidence to meet the below criteria, we note that nothing in the pertinent regulation permits the submission of comparable evidence to establish eligibility for Schedule A, Group II designation.[1] Given the introductory language to the criteria emphasized above in 20 C.F.R. § 656.22(d), the evidence submitted to meet these criteria should be indicative of or consistent with "widespread acclaim and international recognition." The criteria follow.

> *Documentation of the alien's receipt of internationally recognized prizes or awards for excellence in the field for which certification is sought.*

For the reasons discussed above, the petitioner has not demonstrated that the beneficiary has personally received any internationally recognized prizes or awards.

> *Documentation of the alien's membership in international associations, in the field for which certification is sought, which require outstanding achievement of their members, as judged by recognized international experts in their disciplines or fields.*

As discussed above, the petitioner has never claimed that the beneficiary is a member of an exclusive association and the record contains no evidence relating to this criterion.

> *Published material in professional publications about the alien, relating to the alien's work in the field for which certification is sought, which shall include the title, date, and author of such published material.*

The petitioner submitted four brief articles appearing in German newspapers featuring the beneficiary. The accompanying translations list the purported circulation of the newspapers. While the director appears to accept the circulation claims, the director questioned the assertion that the readership is double the circulation. On appeal, counsel asserts that readership for daily papers is typically 2.4 times the circulation and the petitioner submits confirmation of that information. Counsel further asserts that the selection to feature the beneficiary alone sets her apart from others.

We concur that selection for a favorable news story in a qualifying publication can serve to meet this criterion. The petitioner has not established, however, that the newspapers are qualifying publications. While readership may be typically more than double circulation, it remains that the petitioner failed to submit any evidence that these publications are *nationally* distributed or read in

[1] The CIS regulation at 8 C.F.R. § 204.5(k)(3)(iii) permits the submission of comparable evidence to meet the visa classification, but no similar language is found at 20 C.F.R. § 656.22(d) relating to Schedule A, Group II.

Germany. Given the text of the articles, they appear to be in local Koeln newspapers, the city in which the beneficiary was born. Moreover, the plain language of the regulation at 20 C.F.R. § 656.22(d)(3) requires that the published materials appear in "professional publications." The articles submitted appear to have been published in the general media. Thus, the petitioner has not established that she meets this criterion.

Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which certification is sought.

The petitioner has never claimed that the beneficiary meets this criterion and the record contains no evidence relating to it.

Evidence of the alien's original scientific or scholarly research contributions of major significance in the field for which certification is sought.

The petitioner submitted numerous letters from exceedingly renowned members of the beneficiary's field. The letters provide high praise of the beneficiary's work. None of the evidence, however, suggests that the beneficiary's work as a character layout artist, regardless of how good this work may be, is a *scientific or scholarly research* contribution. This criterion simply does not appear applicable to practicing artists, as opposed to art scholars. As stated above, the regulation at 20 C.F.R. § 656.22(d) does not provide for the submission of comparable evidence where a criterion is not applicable. As such, we simply cannot consider any artistic contributions the beneficiary may have made.

Evidence of the alien's authorship of published scientific or scholarly articles in the field for which certification is sought, in international professional journals or professional journals with an international circulation.

The petitioner has never claimed that the beneficiary meets this criterion and the record contains no evidence relating to it.

Evidence of the display of the alien's work, in the field for which certification is sought, at artistic exhibitions in more than one country.

The petitioner submitted evidence that the beneficiary is credited as one of several character layout artists for "The Simpsons," which is televised worldwide. It is inherent to the field of animator to animate movie or television characters. Not every animated movie or television show is an artistic exhibition designed to showcase the work of the character layout artists. As such, the petitioner has not established that the beneficiary meets this criterion.

The documentation submitted in support of a claim of Schedule A, Group II exceptional ability must clearly demonstrate that the alien has achieved widespread acclaim and international recognition. The petitioner has shown that the beneficiary is a talented animator and graphic designer, who has won the

respect of her collaborators, employers, and mentors. The record, however, stops short of elevating the beneficiary to having widespread acclaim and international recognition. Therefore, the petitioner has not established that the beneficiary is qualified for the benefit sought.

Finally, we acknowledge that the beneficiary recently received a nonimmigrant visa as an alien of extraordinary ability. The criteria for that classification, however, differ significantly from the criteria for the classification sought and Schedule A, Group II designation.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.